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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| MARS A. RODRIGUEZ,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>HEWLETT PACKARD CO., et al.,<br><br>Defendants and Respondents. | H032514<br>(Santa Clara County<br>Super.Ct.No. CV785294) |

This employment action was filed 10 years ago—in October 1999. In around 2002, the parties engaged in formal settlement efforts, as a result of which they entered into what defendants perceived to be a binding settlement agreement that plaintiff Mars Rodriguez refused to sign. Defendants then made numerous efforts over the next five years to enter a judgment in conformance with the settlement agreement under Code of Civil Procedure section 664.6.[1]

In August 2007, on defendants' ex parte application, the court directed the clerk, on Rodriguez's behalf, to sign the settlement agreement, which had been modified over the years with the court's input to address some of Rodriguez's stated concerns about its content. Immediately after the agreement was so executed, Rodriguez exercised her right

[1] Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

to revoke it according to its terms under a revocation provision inserted under the federal Age Discrimination Claims Assistance Amendments of 1990 (29 U.S.C. § 626 (f)(1) & (2)). This left the matter at large, nearly eight years after its filing. Defendants moved to dismiss the action under the mandatory and, alternatively discretionary, provisions for delay in prosecution. (§§ 583.310 & 583.410.) The trial court granted the discretionary motion to dismiss under section 583.410 and Rodriguez appeals. Finding no abuse of discretion, we affirm.

STATEMENT OF THE CASE

In a prior unpublished opinion dismissing Rodriguez's two prior appeals for the absence of appealable orders, we outlined in detail the "tortured saga of the parties' attempts to settle [her] employment discrimination and wrongful termination lawsuit filed in [October]1999" against Hewlett Packard and several individuals who had worked with Rodriguez there. (*Rodriguez v. Hewlett Packard* (H029055, March 9, 2007) [nonpub. opn.], p. 1.) We incorporate that history here and need not repeat it. But we note that in the hope the case could finally be resolved on remand one way or another, we offered in our prior opinion some guidance to the court and the parties. We observed that one of the court's prior orders had directed the parties to sign the settlement agreement within 20 days and if a party failed to do so, another party could seek an ex parte order directing the clerk to sign on the recalcitrant party's behalf. (*Id.* at p. 12.) Upon this event, the seven-day revocation period would go into effect. If Rodriguez timely revoked the agreement, then the action would again be "at large and should be set for trial, subject to a motion to dismiss for plaintiff's delay in prosecution." (*Id.* at p. 13.)

On remand, these eventualities played out. On defendants' ex parte application, on August 9, 2007, the court directed the clerk to sign the settlement agreement on Rodriguez's behalf. Rodriguez then timely revoked the agreement pursuant to its terms. Some two months later, defendants filed their motion to dismiss for delay in prosecution,

invoking both the mandatory grounds for failure to bring the action to trial within five years (§ 583.310) and the discretionary grounds for failure to bring the action to trial within three years (§§ 583.410, 583.420, subd. (a)(2)(A).) Over Rodriguez's opposition, the court granted the discretionary motion for dismissal by order filed November 21, 2007.[2] The court stated that it had considered all factors set out in Californa Rules of Court , rule 3.1342, subdivision (e)[3] in granting the motion and it found that "most of the delay in the prosecution of this action is attributable solely to plaintiff." Rodriguez

[2] The court denied the motion for mandatory dismissal, concluding that the action was tolled for purposes of calculating the five-year period from the point in December 2002 when the parties entered into a settlement in open court until Rodriguez revoked the agreement on August 10, 2007.

[3] This rule sets out an extended notice and briefing period for a motion for discretionary dismissal under section 583.410. It also provides, at subdivision (e), that the court "must consider all matters relevant to a proper determination of the motion, including: [¶] (1) The court's file in the case and the declarations and supporting data submitted by the parties and, where applicable, the availability of the moving party and other essential parties for service of process; [¶] (2) The diligence in seeking to effect service of process; [¶] (3) The extent to which the parties engaged in any settlement negotiations or discussions; [¶] (4) The diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party; [¶] (5) The nature and complexity of the case; [¶] (6) The law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case; [¶] (7) The nature of any extensions of time or other delay attributable to either party; [¶] (8) The condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial; [¶] (9) Whether the interests of justice are best served by dismissal or trial of the case; and [¶] (10) Any other fact or circumstance relevant to a fair determination of the issue. The court must be guided by the policies set forth in . . . section 583.130." (Cal. Rules of Court, rule 3.1342(e).) Section 583.130 in turn expresses state policy that a plaintiff should proceed with reasonable diligence but that all parties shall cooperate in bringing the action to trial or other disposition. The section further expresses that state policies favoring a party's right to make stipulations in its own interest and trial on the merits are preferred over the policy that requires dismissal for failure to proceed with reasonable diligence.

appeals from the order granting the motion to dismiss the action for failure to prosecute it within three years.[4]

DISCUSSION

I. *General Legal Principles and Standard of Review*

Section 583.410, subdivision (a) provides that a court "may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case." Section 583.410, subdivision (b) provides that the dismissal shall be pursuant to rule of court and rule 3.1342 of the California Rules of Court

[4] A dismissal order is appealable as a "judgment" if it is in writing, signed by the court, and filed in the action. (§ 581d; *Cano v. Glover* (2006) 143 Cal.App.4th 326, 328; *Kahn v. Lasorda's Dugout, Inc.* (2003) 109 Cal.App.4th 1118, 1120, fn. 1.) The order granting the motion here is not appealable as it does not contain an actual order of dismissal. (*Eliceche v. Federal Land Bank Assn.* (2002) 103 Cal.App.4th 1349, 1359, fn. 12.) And the record does not contain a judgment of dismissal. "The existence of an appealable judgment is a jurisdictional prerequisite to an appeal. A reviewing court must raise the issue on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by . . . section 904.1. [Citations.]" (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126-127.) On occasion, appellate courts have reviewed orders sustaining demurrers without leave to amend, which are similarly nonappealable, based upon justifications such as the avoidance of delay, the interests of justice, and the apparent intent of the trial court to have a formal judgment filed. (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1395-1396 (*Sisemore*); *Reyna v. City and County of San Francisco* (1977) 69 Cal.App.3d 876, 879.) In doing so, an appellate court may deem the order to incorporate a judgment of dismissal, since all that is left to make the order appealable is the formality of the entry of a dismissal order or judgment. (*Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1098; see also *Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 520 [appeal from order sustaining demurrer without leave to amend deemed proper to avoid delay and in furtherance of justice].) Such is the situation here. The order granting the motion to dismiss the action effectively ended plaintiff's ability to proceed further with her case below. The only step left to make the order appealable was the formal entry of a dismissal order or judgment. In the interests of judicial economy and to avoid yet another appeal, we will accordingly deem the order to incorporate a judgment of dismissal and will review it. (*Thaler*, at p. 1098; *Sisemore,* at p. 1396.)

(subdivision (e) of which is quoted above at fn. 3) provides the relevant criteria that the court must consider in determining the motion. Under section 583.420, an action may be dismissed for delay in prosecution if more than three years has elapsed since the action was commenced. (§ 583.420, subd. (a)(2)(A).) In computing the elapsed time, there shall be excluded the time during which the jurisdiction of the court was suspended, prosecution or trial of the action was stayed or enjoined, or bringing the action to trial was impossible, impracticable, or futile. (§§ 583.420, subd. (b), 583.340.)

Legislative policy favors trial on the merits. (§ 583.130.) But, "there comes a time when that policy is overridden by California's policy requiring dismissal for failure to prosecute with reasonable diligence." (*Van Keulen v. Cathay Pacific Airways, Ltd.* (2008) 162 Cal.App.4th 122, 130 (*Van Keulen*).) "The competing considerations to be evaluated are the policies of discouraging stale claims and compelling reasonable diligence balanced against the strong public policy which seeks to dispose of litigation on the merits rather than on procedural grounds." (*Terzian v. County of Ventura* (1994) 24 Cal.App.4th 78, 82-83.) "Prejudice to a defendant is inherent when actions are dilatorily prosecuted." (*Martin v. K & K Properties, Inc.* (1987) 188 Cal.App.3d 1559, 1565.) Thus, the policy favoring litigation on the merits only comes into play if the plaintiff makes a showing of excusable delay. (*Van Keulen, supra*, at p. 131.)

The trial court's decision on a discretionary dismissal motion is not subject to reversal on appeal absent a showing of manifest abuse resulting in a miscarriage of justice. *(Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 698 (*Landry*); *Van Keulen, supra,* 162 Cal.App.4th at p. 131.) "Such abuse of discretion is generally considered to be demonstrated when the trial court has exceeded the bounds of reason. [Citation.] We must presume the trial court's order was correct, and it is the [appellant's] burden to overcome that presumption and establish a clear abuse of discretion." (*Landry, supra,* 39 Cal.App.4th at p. 698.*)* Express findings are not required

and we presume that the court followed the law in making its determination, including a consideration of the criteria set forth in California Rules of Court, rule 3.1342(e) (replacing former rule 373(e)). (*Landry*, at pp. 698-699.)

II. *Rodriguez Has Shown no Abuse of Discretion*

Rodriguez articulates no particular, focused, or cognizable claims of error on appeal in her briefing, which generally consists of listings of items in the record and general complaints about events occurring in the litigation. We have attempted without success to ascertain and comprehend what her arguments on appeal from the court's order of dismissal may be. Needless to say, the failure to articulate particular points of error supported by citations to appropriate authority will not result in a showing of abuse of discretion warranting reversal.

It is the appellant's burden to present argument supported by relevant legal authority on each point raised. This requires more than simply stating a bare conclusion that the judgment, or any part of it, is erroneous and leaving it up to the appellate court to figure out why. It is not the court's role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.) When an appellant asserts a point but fails to support it with argument and citations to relevant authority, the court may treat the point as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 775 [issue deemed waived where appellants failed to support claim with argument, discussion, analysis, or citation to the record, or to include trial proceedings in the record].)

Moreover, the arguments in an appellant's briefs must include coherent analysis and discussion, supported by pertinent authority that discloses the course of logical or legal reasoning by which the appellant comes to the conclusions he or she wants us to adopt. (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007.)

And the arguments must "be tailored according to the applicable standard of appellate review." (*Sebago, Inc v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1388.) The failure to acknowledge the proper scope of review may be considered as a concession of a lack of merit. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.) " '[I]t is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondent. An appellant is not permitted to evade or shift his [or her] responsibility in this manner.' " (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 102.)

Rodriguez represents herself on appeal, as she did in the trial court when she opposed the motion to dismiss. Under the law, one may act as his or her own attorney if he or she so chooses but the rules of appellate review just discussed apply to all litigants without regard to the status of their legal representation. In other words, Rodriguez is not exempt from the foregoing rules because she is representing herself on appeal. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.) " '[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]' [Citation.] Thus, as is the case with attorneys, pro. per. litigants must follow correct rules of procedure. [Citations.]" (*Id*. at p. 1247.) Accordingly, when a party appears in propria persona, he or she is held to the same restrictive rules of procedure and evidence as an attorney—no different, no better, and no worse. (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639; *Monastero v. Los Angeles Transit Co.* (1955) 131 Cal.App.2d 156, 160-161.)

This action was filed in October of 1999. Three years and two months later, in December 2002, the parties put a settlement on the record in open court. Rodriguez fought against enforcement of the settlement for the next nearly five years until the clerk was directed by the court to sign the settlement agreement on her behalf. Then, Rodriguez immediately exercised her power to revoke the settlement pursuant to its

terms, a power that she alone could have exercised at any previous time during the five years by simply signing the agreement and then revoking it within seven days of execution.

The trial court expressly stated in granting the motion that it had considered the relevant factors, including those set forth at rule 3.1342(e). And it specifically found that most of the delay in prosecuting the action was solely attributable to Rodriguez. She does not argue on appeal that any period during the first three years of the litigation should be excluded from the calculation of the time. Nor does she point to anything in the relatively voluminous record (consisting of eight volumes of clerk's transcript and four volumes of reporter's transcript) to counter that the delay was not mostly attributable to her or that such delay was excusable.

As far as the record shows, the trial court appropriately exercised its broad discretion to dismiss under sections 583.410 and 583.420, subdivision (a)(2)(A) in considering the relevant factors. The court came to a determination that is supported by the record, denying the alternative motion made under the mandatory provisions of section 583.310.[5] Rodriguez has therefore failed to carry her burden on appeal of showing that the court abused its discretion in granting the discretionary motion to dismiss. We accordingly affirm the order of dismissal.

[5] As we are affirming the court's order, we need not address the alternative motion that the court rejected. Defendants did not appeal from the denial of their motion for mandatory dismissal under section 583.310 in any event.

## DISPOSITION

The order, deemed as one of dismissal, is affirmed.

Duffy, J.

WE CONCUR:

Mihara, Acting P.J.

McAdams, J.